IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 28790

STATE OF IDAHO,	)	
	)	**2004 Opinion No. 69**
Plaintiff-Respondent,	)	
	)	**Filed: November 24, 2004**
v.	)	
	)	**Frederick C. Lyon, Clerk**
JOSEPH ALLEN MANLEY,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Boundary County. Hon. James Ralph Michaud, District Judge.

Order denying motion to dismiss second degree murder charge on double jeopardy grounds, and order dismissing charge without prejudice on other grounds, affirmed.

Jonathan W. Cottrell, Sandpoint, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent. Kenneth K. Jorgensen argued.

LANSING, Chief Judge

During Joseph Allen Manley's trial on a charge of second degree murder, the district court sua sponte declared a mistrial based on the court's view that Manley's appointed counsel was providing incompetent representation and was emotionally unfit to continue.[1] Manley thereafter moved to dismiss the case on the ground that the mistrial order was unjustified and that another trial for the same offense therefore would violate his constitutional guarantee against double jeopardy. The district court denied Manley's motion but subsequently dismissed the case without prejudice on the State's motion to dismiss for lack of evidence. On appeal, Manley contends that the dismissal should have been with prejudice because a retrial would subject him to double jeopardy. The State argues that the prosecutor's voluntary dismissal of the action

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[1] A different attorney represents Manley in this appeal.

renders the double jeopardy issue moot. We conclude that the issue is not moot but that Manley has failed to show that the double jeopardy bar would be violated if he were subjected to reprosecution.

I.

FACTUAL & PROCEDURAL BACKGROUND

On December 14, 2001, Manley and his eighteen-year-old brother, Chris, were visiting their father in Moyie Springs to celebrate Manley's seventeenth birthday. After their father left home for the evening, Manley and Chris went to a neighbor's house, where they drank alcohol with friends to the point of intoxication. The two got into a fight, but eventually returned together to their father's home. Neighbors then heard loud voices and doors being slammed inside the home. Manley claims that he eventually went into the bathroom to get away from Chris and that he fell asleep or passed out in the bathroom. At approximately 11:45 that night, Chris was shot in the left shoulder as he was sitting on the living room couch. It is disputed whether the shot was accidental, self-inflicted, or fired by an assailant. After being shot, Chris went to a neighbor's residence and banged on the door but did not say anything. He died shortly after the police arrived, without having uttered a word. The police followed Chris's bloody trail back to the Manley home and found the couch and other areas of the living room sprayed with blood, and on the floor in front of the couch, a blood-splattered hunting rifle that belonged to Manley's father. In searching the house, they discovered Manley in the bathroom. He was handcuffed and removed from the home by walking through blood-splattered areas. Manley was arrested that night and charged with second degree murder.

The State's analysis of the trajectory of the bullet through Chris's body and into the wall, together with other forensic evidence, led to the conclusion that at the time of the fatal shot, Chris had been seated on the living room couch, leaning forward toward the floor. At the moment of discharge, the muzzle of the rifle was in contact with Chris's chest, with the butt of the rifle near his feet. Thus, if the rifle was fired by another person, the assailant must have fired upward at Chris while crouching or lying on the floor beneath him.

A public defender was appointed to represent Manley. The trial was scheduled for March 25, 2002. The State made a formal discovery request on January 4, but defense counsel did not provide any written discovery responses until March 19, less than one week before trial. At a pretrial conference the district judge attempted to ensure that pretrial issues, such as

discovery and identification of witnesses, and exhibits, were resolved before trial. The State did not disclose one of its expert witnesses, Mr. Park, until March 21, four days before trial. On that date the State produced Park's forensic report which described tests performed on the rifle and a test of blood found on the rifle. The report did not indicate that Park had considered or would testify concerning bloodstains on Manley's pants.

At trial, the State relied upon two primary pieces of evidence--apart from the evidence that Manley and Chris had been fighting the evening before Chris's death--to show that Manley had committed the shooting. The first was a statement that Manley allegedly made to police before he had been told of his brother's death. The second was bloodstains found on the left cuff of Manley's pants. The evidence of Manley's comment to the police came through the testimony of one of the arresting officers, Pete Atkins. He said that he had prepared an arrest report in which he had written what Manley said immediately after being confronted by police in the bathroom of the Manley home. The prosecutor asked Atkins if he recalled that, before being removed from the residence, Manley said, "I am not mad, man. I didn't kill my own brother, man. My brother, like, kicks my ass." Atkins replied that he recalled that statement. This evidence was proffered by the State to show that Manley was aware of the killing before it had been mentioned by the police. Defense counsel impeached Atkins by showing that the alleged statement was not recorded either in Atkins' arrest report or on a tape recording of the arrest. The parties eventually stipulated that the jury would be instructed that the actual statement recorded in the arrest report was, "My brother (Christopher) kicked my ass . . . my brother kicked my ass, I'm not mad at him at all."

The prosecutor also elicited testimony from expert witness Park that bloodstains found on the lower left cuff of Manley's pants resulted from blood splattering from Chris's body onto Manley, indicating that Manley was present at the shooting.[2] Defense counsel objected to this portion of Park's testimony on the ground that the questioning was speculative and lacked adequate foundation, but he made no objection based upon the State's failure to disclose the substance of the blood splatter testimony prior to trial. The objection that was made was overruled.

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[2] Other small spots or smears of Chris's blood found on Manley's clothing were believed by the State to be caused by transfer from a bloody object and not by splatter from the gunshot.

On the fourth day of trial, defense counsel delivered his opening statement, during which he experienced emotional difficulty at several points. Defense counsel excused himself twice to the jury after breaks in his speech. Once he said, "I'm not sure how well [Manley's father will] hold up but he'll tell you a few little things about their relationship--excuse me. I'm from a family of five boys and I have three sons so I'm really into this case. Sorry." At another point, defense counsel excused himself again and said, "I gotta have a cup of water. Sorry."

Shortly after this opening, defense counsel attempted to introduce five defense exhibits. The apparent purpose of some of the exhibits was to rebut Park's testimony about the blood spatter evidence. The State objected on the ground of untimely disclosure of the exhibits and lack of foundation. The court excluded three of the five exhibits for untimely disclosure, but left open the possibility that the other two could be admitted if adequate foundation were laid. The court also questioned whether defense counsel may have purposefully waited until the State's experts had been excused before introducing the previously undisclosed exhibits so that the State would be unable to present the experts' rebuttal testimony.

Immediately thereafter, defense counsel asked, "Why are you angry at me, Your Honor?" After the judge denied being angry, counsel moved to exclude Manley's pants and shirt, which had previously been offered by the State and admitted. Defense counsel argued that they should be excluded because the State had not provided to the defense a report as to what Park would testify to, and because defense requests to the State to examine the pants and shirt in the three months before trial had been ignored. The court held that the defense motion was not timely. At that point, the following colloquy took place:

> DEFENSE COUNSEL: I know about your dislike for me because I'm supportive of [a candidate who had been the judge's opponent in the judge's bid for re-election].
> THE COURT: Mr. [Defense Counsel]--
> DEFENSE COUNSEL: And I resent what you're doing here. You're just--you're just--and I'm just starting my part of the case and you're doing this--this to me. God help me if I don't have a heart attack over it. I need a little time to get recomposed so I can try to defend this young man as he deserves to be.
> THE COURT: Well, we're going to be in recess and if you don't feel like you're capable then you address the court in that fashion. It's not appropriate for me to comment on your remarks about resenting you because [the candidate] filed for election but that comment astonishes me and it suggests to me that your emotional state is in serious question. We're going to take that recess now.

When the court reconvened fifteen minutes later, the district court declared a mistrial sua sponte without first entertaining argument from the parties. The court explained its decision as follows:

> Because of the court's concern about either the mental and/or emotional condition of [defense counsel] and because of the court's observation during the proceedings recently in this trial, not just beginning at the beginning of this trial but certainly including them, and because of the things that just happened when we were last in court a few minutes ago, the court is on its own motion pursuant to Rule 29.1(c) declaring this trial at an end and declaring a mistrial.
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> In addition, the court will hold a hearing at a later date to determine whether the defendant should be represented by [the same attorney]. The court has grave concerns about [the attorney's] representation of the defendant in this case and grave concerns about whether the defendant has due process of law under the circumstances. The court intends to issue a written order further detailing the reasons for declaring this mistrial.

In a subsequent written order, the court delineated in more detail its concerns about defense counsel's performance and competence.

Manley thereafter moved to dismiss the murder charge. He argued that the sua sponte mistrial order had been unjustified and made without his consent, and therefore his retrial was barred by the constitutional guarantee against double jeopardy. The district court denied the motion. The State then filed its own motion for dismissal with prejudice on double jeopardy grounds, and the district court denied that motion as well. The State sought permission, pursuant to Idaho Appellate Rule 12, to take an interlocutory appeal, but the district court disapproved that request. The court set a new trial date and appointed another attorney to represent Manley. A week before the second trial was to begin, the State moved to dismiss on the ground that it could not sustain its burden of proof. The prosecutor explained that he had consulted a second expert who disagreed with Park's opinion that the bloodstains on Manley's pants were the result of his being present at the shooting. The prosecutor felt that, with this conflicting evidence, the State could not prevail at a new trial. The district court granted the motion, specifying in its order that such dismissal was without prejudice and would not bar a future prosecution for the same offense.

On appeal, Manley contends that the dismissal should have been with prejudice, and that the district court erred in rejecting his double jeopardy defense, because a second trial on the murder charge would violate the Double Jeopardy Clauses of the state and federal constitutions. These constitutional protections apply, he asserts, because the mistrial order was unjustified and

was issued without a prior hearing and without Manley's consent. The State responds that we should not address the issue raised by Manley because the double jeopardy defense is not ripe for review and became moot when the State dismissed the charge.[3]

II.
ANALYSIS

A. Justiciability Issues

1. Ripeness

We first address the State's contention that Manley's double jeopardy claim is not yet ripe for review. Under the ripeness doctrine, a court will decline to address a claim unless the case presents definite and concrete issues, a real and substantial controversy exists, and there is a present need for adjudication. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002); *Boundary Backpackers v. Boundary County*, 128 Idaho 371, 376, 913 P.2d 1141, 1146 (1996).

Manley's double jeopardy claim was ripe when he filed his motion to dismiss in the district court. Manley had previously been placed in jeopardy when the jury was empanelled for his trial, *see Crist v. Bretz*, 437 U.S. 28, 32-33 (1978); *State v. Avelar*, 132 Idaho 775, 778, 979 P.2d 648, 651 (1999); *State v. Stevens*, 126 Idaho 822, 825-26, 892 P.2d 889, 892-93 (1995), and the second degree murder charge was still pending against him when his dismissal motion was filed. The question whether further prosecution should be precluded was a definite and concrete issue, presenting a real and substantial controversy, and there was a need for a judicial determination of that issue. Unquestionably, the claim was ripe for adjudication. The State conceded at oral argument that the record pertinent to Manley's double jeopardy claim has been fully developed, and no additional information could be added to the record that would place a reviewing court in a better position than we occupy to consider the merits of the issue. We therefore reject the State's contention that the double jeopardy issue is not ripe for our consideration.

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[3] The State takes this position on appeal even though, in the district court, the State joined in Manley's position that his reprosecution was prohibited by the constitutional bar against double jeopardy.

The State cites several cases from other jurisdictions in which appellate courts, on ripeness grounds, declined to consider double jeopardy issues after a mistrial. Those cases are readily distinguishable. In most of them, either the double jeopardy issue was raised for the first time on appeal, and the matter was therefore not ripe for *appellate* review, or the issue was raised at a point when it was not clear whether the defendant would in fact be subjected to further prosecution. *See State v. Morgan*, 985 P.2d 1022, 1024 (Alaska Ct. App. 1999); *State v. Rasch*, 935 P.2d 887, 890-91 (Ariz. Ct. App. 1996); *McCuen v. State*, 382 S.E.2d 422, 423 (Ga. Ct. App. 1989); *York v. State*, 751 So. 2d 1194, 1199-1200 (Miss. Ct. App. 1999); *State v. Siferd*, 783 N.E.2d 591, 597 (Ohio Ct. App. 2002); *State v. Markarian*, 551 A.2d 1178, 1182-83 (R.I. 1988); *Burks v. State*, 876 S.W.2d 877, 889 (Tex. Crim. App. 1994). In one of the cases, *Commonwealth v. Moose*, 623 A.2d 831, 835 n.2 (Pa. Super. Ct. 1993), the court merely stated in a footnote that the defendant, who had earlier successfully appealed from his judgment of conviction, thereby obtaining a remand for a new trial, was not estopped from raising the double jeopardy bar to prevent retrial on remand. The court stated that it was not axiomatic at that juncture that the commonwealth would undertake reprosecution. *Id.* In Manley's case, by contrast, when he filed his dismissal motion based on the double jeopardy bar, the second degree murder charge was still pending against him, and before the court acted on the motion, a retrial date for Manley had been scheduled. The double jeopardy issue had become ripe for resolution.

2. Mootness

The more salient question is whether the double jeopardy issue, although ripe, became moot when the prosecutor subsequently dismissed the charge on other grounds. An issue is moot if it "presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome" of the case. *Comm. for Rational Predator Mgmt. v. Dep't of Agric.*, 129 Idaho 670, 672, 931 P.2d 1188, 1190 (1997); *Idaho Sch. for Equal Educ. Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281-82, 912 P.2d 644, 649-50 (1996). The controversy must be live at the time of the court's hearing. *Id*. at 282, 912 P.2d at 650. A party lacks a legally cognizable interest in the outcome if even a favorable judicial decision would not result in relief. *See Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982).

An otherwise moot issue remains justiciable, however, if the challenged conduct persists in causing collateral legal consequences for the challenger. *Butler v. State*, 129 Idaho 899, 900-01, 935 P.2d 162, 163-64 (1997); *State v. Alldredge*, 96 Idaho 7, 8, 523 P.2d 824, 825 (1974);

Adams v. Killeen, 115 Idaho 1034, 1035, 772 P.2d 241, 242 (Ct. App. 1989); *Russell v. Fortney*, 111 Idaho 181, 183, 722 P.2d 490, 492 (Ct. App. 1986). "[A] criminal case is moot only if is shown that there is *no possibility* that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Sibron v. New York*, 392 U.S. 40, 57 (1968). *See also Smith v. State*, 94 Idaho 469, 471, 491 P.2d 733, 735 (1971).[4] Thus, Idaho courts have held that a challenge to a criminal conviction does not become moot when the sentence has been fully served because the conviction on the individual's record could adversely affect his parole eligibility in other cases. *Alldredge*, 96 Idaho at 8, 523 P.2d at 825; *Smith*, 94 Idaho at 471, 491 P.2d at 735. And in a habeas corpus action where the challenged disciplinary action against an inmate had been terminated before completion of the appeal, the mere possibility that the inmate's parole eligibility would be adversely affected by the disciplinary penalty was sufficient to avoid mootness. *Calkins v. May*, 97 Idaho 402, 403-04, 545 P.2d 1008, 1009-10 (1976). Manley asserts that he will suffer collateral consequences if a double jeopardy defense is not addressed on this appeal because he will remain forever at risk of being again charged with and tried for murder, a risk that would be terminated by a favorable decision on this appeal.

We agree that the collateral consequences exception to mootness applies, not merely because Manley would otherwise live under a cloud of potential prosecution, but because he would otherwise have no right to an appellate court determination of the validity of his double jeopardy defense before he could be subjected to a second trial. The double jeopardy clauses of the state and federal constitutions prohibit not just multiple punishments but also multiple prosecutions for the same offense. *United States v. Dixon*, 509 U.S. 688, 696 (1993); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *State v. Pizzuto*, 119 Idaho 742, 756, 810 P.2d 680, 694 (1991), *overruled on other grounds by State v. Card*, 121 Idaho 425, 432, 825 P.2d 1081, 1088 (1991). The multiple prosecution component of double jeopardy "ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." *Ohio v. Johnson*, 467 U.S. 493, 498-99 (1984). The double jeopardy clauses thus represent "a constitutional policy of finality for the

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[4] *Overruled on other grounds by Kraft v. State*, 100 Idaho 671, 603 P.2d 1005 (1979) (as stated in *Baruth v. Gardner*, 110 Idaho 156, 160, 715 P.2d 369, 373 (Ct. App. 1986)).

defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479 (1971). If the State were to again charge Manley for Chris's death, he could move for dismissal on the basis of double jeopardy, but if that motion were denied, he would not be entitled to appeal the denial order until after final disposition of the charge. Thus, he could be forced to undergo a full second trial, the very harm that the double jeopardy safeguards are designed to prevent, before obtaining appellate review of this defense. This is so because the Idaho Appellate Rules do not confer a right to appeal from an order denying a motion to dismiss, which is by nature an interlocutory order. *See* Idaho Appellate Rule 11(c). Although a defendant may seek permission for an interlocutory appeal under I.A.R. 12, such permission may be denied. No procedural mechanism currently exists to ensure appellate review of a defendant's double jeopardy defense before the defendant endures a second trial.

This very factor--the need for timely appellate review of a double jeopardy defense to prevent the protection from being effectively lost--led the United States Supreme Court to conclude that an order denying a defense motion to dismiss on double jeopardy grounds should be deemed a "final decision" from which an immediate appeal could be taken under 28 U.S.C. § 1291. *Abney v. United States*, 431 U.S. 651 (1977).[5] Although recognizing that the denial of a motion to dismiss an indictment on double jeopardy grounds is not "final" in the sense that it terminates the criminal proceeding, the Court nonetheless held that it should be deemed a final decision for appeal purposes in part because an immediate appeal is essential to preserve the double jeopardy safeguard. The *Abney* Court noted that the double jeopardy clause not only protects against the risk of a second conviction, but also "assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Id.* at 661. The Court then concluded:

> Obviously, these aspects of the guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be

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[5] The statute being interpreted in *Abney*, 28 U.S.C. § 1291, authorized appeals from all "final decisions" of the district court. Idaho Appellate Rule 11(c) is not so broad. The most analogous provisions of Rule 11(c) are subsection (1), which authorizes appeals from final judgments of conviction, and subsection (4) which allows appeals from any order or judgment terminating a criminal action, I.A.R. 11(c)(4). An order denying a motion to dismiss on double jeopardy grounds does not satisfy either of these criteria.

> taken; even if the accused is acquitted, or if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Abney, 431 U.S. at 662 (emphasis original). Although *Abney* dealt with the interpretation of an ambiguous federal statute, and does not declare a constitutional right to an immediate appeal, the Court's reasoning is pertinent to our determination whether a collateral legal consequence saves Manley's double jeopardy claim from mootness.

The State contends that the Idaho Supreme Court decision in *State v. Hoyle*, Docket No. 30084 (July 21, 2004), dictates a determination that Manley's appeal is moot. In *Hoyle*, the defendant was charged with three counts of racketeering. The State alleged numerous predicate acts for the racketeering counts but did not charge the predicate acts as separate offenses. The jury acquitted on two of the three racketeering charges, and found Hoyle not guilty on 23 of 30 predicate acts with respect to the final racketeering charge. As to the other seven predicate acts, the jury was unable to reach agreement. The district court entered a judgment of acquittal for the first two counts and dismissed the 23 predicate acts on which the jury agreed. The district court also denied Hoyle's motion for acquittal on the third count. The State later informed the court that it would not proceed to retrial on the third count because it had filed a separate case, "Case 795," charging Hoyle with separate offenses for five of the seven remaining predicate acts on which the jury had been undecided. In addressing Hoyle's contentions on appeal that his motion for acquittal as to the third racketeering count should have been granted, the Supreme Court majority discussed the two unresolved predicate acts not alleged in Case 795:

> [T]he district court dismissed the instant case and the state has abandoned its prosecution for alleged Acts 9 and 62; as such, these Acts are moot and will not be analyzed.

Hoyle, at 7. The State contends that this language indicates that the abandonment of charges by the State makes all double jeopardy issues relating to those charges moot and non-justiciable. We disagree. Although it was not mentioned in the *Hoyle* opinion, we note that in that case, any risk of reprosecution on the dismissed charges was eliminated by the statute of limitation. The predicate acts evidently were alleged to have occurred prior to June 12, 1997, the date of the indictment, and the Idaho Supreme Court's decision on appeal was issued in July 2004. Therefore, Hoyle was protected by the five-year statute of limitation, I.C. § 19-402(1), from any

reprosecution for acts not alleged in Case 795. For Manley, by contrast, there is no statute of limitation on a murder charge. I.C. § 19-401.

Moreover, we note that the *Hoyle* Court decided to reach the merits of Hoyle's double jeopardy claim as to the five recharged predicate acts of the third racketeering charge, even though the racketeering charge had been dismissed in the case that was on appeal. The Court stated:

> [I]f Hoyle's Motion for Judgment of Acquittal should have been granted by the district court, double jeopardy bars Hoyle's subsequent prosecution in Case 795 because the predicate acts at issue constitute lesser-included offenses of racketeering as charged in Count B. *Sivak v. State*, 112 Idaho 197, 210-15, 731 P.2d 192, 205-10 (1986). As such, Hoyle's challenge is justiciable under the "collateral legal consequences" exception. *Russell v. Fortney*, 111 Idaho 181, 183, 722 P.2d 490, 4932 (Ct. App. 1986).

Although we recognize that there is an important distinction between *Hoyle* and the present case in that the second prosecution had been brought against Hoyle and was pending at the time of his appeal, it is nevertheless noteworthy that the Idaho Supreme Court considered Hoyle's double jeopardy claim in the appeal from the *first* case, where the charge to which it related had been dismissed. The Court did not require that Hoyle re-raise the double jeopardy defense in the second prosecution and pursue the issue on appeal in that case, as the State contends that Manley should be required to do here if another prosecution is ever filed.

Finally, we note that any surmise that Manley faces no real risk of reprosecution because the State dismissed the charge for lack of evidence is belied by the State's own position in this appeal. The State is resisting dismissal of the murder charge with prejudice. The reason for this resistance is evidently to preserve the State's ability to recharge Manley.

For the foregoing reasons, we hold that the collateral legal consequences exception to the mootness doctrine applies here and that the double jeopardy issue raised by Manley in this appeal is not moot.

B. The Mistrial Order

We move, then, to the merits of Manley's assertion that his further prosecution is barred by the constitutional guarantees against double jeopardy because his first trial was wrongfully

terminated by the mistrial order.[6] Notwithstanding the double jeopardy safeguards, a criminal defendant may be retried if the initial trial was terminated before its completion by a mistrial order that was grounded in "manifest necessity." *United States v. Perez*, 22 U.S. 579 (1824); *State v. Lewis*, 123 Idaho 336, 357, 848 P.2d 394, 415 (1993); *State v. Nab*, 113 Idaho 168, 171, 742 P.2d 423, 426 (Ct. App. 1987). A helpful explanation of the interplay between the double jeopardy safeguard and the trial court's authority to declare a mistrial is presented in *State v. Stevens*, 126 Idaho 822, 826-27, 892 P.2d 889, 893-94 (1995) (quoting John E. Theuman, Annotation, *Former Jeopardy as Bar to Retrial of Criminal Defendant After Original Court's Sua Sponte Declaration of a Mistrial -- State Cases*, 40 A.L.R.4th 741, 745-47 (1985)):

> It is a basic principle of American constitutional law, as it was of the English common law, that no person may be twice placed in jeopardy--that is, put on trial with the possibility of conviction and punishment--for the same criminal offense. Under the early common law, this meant that a criminal trial could not be terminated prior to the verdict for any reason without in effect acquitting and discharging the defendant, since any attempt to recommence the prosecution would be barred as double jeopardy. However, modern rules, recognizing that circumstances may arise in the course of a trial which make it impossible to continue the proceedings without serious prejudice to either or both parties, allow the judge to declare a mistrial in a proper case, at the request of the defense or prosecution or on his or her own motion, without prejudice to the right of the prosecution to seek a new trial.
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> The basic rule is that criminal actions may be terminated by a mistrial without double jeopardy consequences if there is a sufficiently compelling reason to do so, some procedural error or other problem obstructing a full and fair adjudication of the case which is serious enough to outweigh the interest of the defendant in obtaining a final resolution of the charges against him--what is commonly termed a "manifest necessity" or "legal necessity." The courts have generally declined to lay out any bright-line rule as to what constitutes "manifest necessity," but have based their decisions on the facts of each case, looking to such factors as whether the problem could be adequately resolved by any less drastic alternative action; whether it would necessarily have led to a reversal on appeal if the trial had continued and the defendant had been convicted; whether it reflected bad faith or oppressive conduct on the part of the prosecution; whether or not it had been declared in the interest of the defendant; and whether and to what extent the defendant would be prejudiced by a second trial.
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[6] Manley does not argue that the State's subsequent voluntary dismissal of the charge on the ground of inadequate evidence independently created a double jeopardy bar, and we express no opinion on that question.

> Aside from "manifest necessity," there are a few other situations in which a mistrial may be declared without giving the defendant a double jeopardy defense against further prosecution. Just as a defendant may not complain of a mistrial which was declared on his or her own motion, so too any double jeopardy defense to retrial will be deemed waived if the defendant consents to the trial court's sua sponte declaration of a mistrial, either expressly or by clear implication, although a mere failure to specifically object to a mistrial, or a prior motion for mistrial on other grounds will not be considered as a consent to the judge's action . . . .

The myriad of factors that courts have considered in making the assessment of "manifest necessity" include:

> (1) the source of the difficulty that led to the mistrial--i.e., whether the difficulty was the product of the actions of the prosecutor, defense counsel, or trial judge, or were events over which the participants lacked control; (2) whether the difficulty could have been intentionally created or manipulated for the purpose of giving the prosecution an opportunity to strengthen its case; (3) whether the possible prejudice or other legal complications created by the difficulty could be "cured" by some alternative action that would preserve the fairness of the trial; (4) whether the record indicates that the trial judge considered such alternatives; (5) whether any conviction resulting from the trial would inevitably be subject to reversal on appeal; (6) whether the trial judge acted during the "heat of the trial confrontation"; (7) whether the trial judge's determination rests on an evaluation of the demeanor of the participants, the "atmosphere" of the trial, or any other factors that similarly are not amenable to strict appellate review; (8) whether the trial judge granted the mistrial solely for the purpose of protecting the defendant against possible prejudice; (9) whether the evidence presented by the prosecution prior to the mistrial suggested a weakness in the prosecution's case (e.g., a witness had failed to testify as anticipated); (10) whether the jurors had heard enough of the case to formulate some tentative opinions; (11) whether the case had proceeded so far as to give the prosecution a substantial preview of the defense's tactics and evidence; and (12) whether the composition of the jury was unusual.

WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE, § 25.2(c) n.18 (2d ed. 1999).

A trial court's finding of manifest necessity for a mistrial is reviewed on appeal for an abuse of discretion. *Stevens*, 126 Idaho at 826, 892 P.2d at 893. The considerable deference that is to be accorded the trial court's determination is illustrated by two United States Supreme Court decisions, *Gori v. United States*, 367 U.S. 364 (1961), and *Arizona v. Washington*, 434 U.S. 497 (1978). In *Gori*, while the prosecutor was questioning a witness, the judge sua sponte declared a mistrial. The judge apparently inferred that the prosecutor was about to elicit inadmissible evidence of other crimes committed by the defendant and took action to forestall it and protect the rights of the accused by declaring a mistrial. On review, the United States

Supreme Court characterized the mistrial order as "neither apparently justified nor clearly erroneous" and the product of "an overeager solicitude" in favor of the accused, *id.* at 367, but nevertheless held that the trial court had not abused its discretion in finding manifest necessity for the mistrial declaration. The Supreme Court said that it had "long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served," and that "we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion." *Id.* at 368. Particularly where it is clear that the mistrial was declared in the sole interest of the defendant, the Court said, "we are unwilling . . . to hold that its necessary consequence is to bar all retrial." *Id.* at 369. To do so, the Court observed, could make trial courts "unduly hesitant conscientiously to exercise their most sensitive judgment--according to their own lights in the immediate exigencies of trial--for the more effective protection of the criminal accused." *Id.* at 370.

The Supreme Court subsequently clarified in *United States v. Jorn*, 400 U.S. 470 (1971), that the mere fact that the mistrial order was intended for the protection of the defendant does not insulate the decision from a finding of abuse of discretion and the consequent double jeopardy bar. Nevertheless, the caution expressed in *Gori*--that a too stringent scrutiny of mistrial orders on appellate review would inappropriately discourage trial judges from declaring a mistrial in appropriate circumstances--remains a factor calling for considerable deference at the appellate level.

The deferential approach in appellate review was reiterated by the Supreme Court in *Washington*, 434 U.S. 497. There, in defense counsel's opening statement he improperly disclosed to the jurors that the defendant had been put on trial in the same case four years earlier but had been granted a new trial because the prosecutor in the first trial had withheld exculpatory evidence. On the basis of defense counsel's presentation of this inadmissible information to the jury, the prosecutor moved for a mistrial, and the trial court granted the motion over defense counsel's objection that any prejudice could be remedied by a curative instruction to the jury. The defendant thereafter filed a federal habeas corpus action, seeking a ruling that he was protected from another trial by the double jeopardy clause. The United States Supreme Court held that the trial court's decision to declare a mistrial based upon the prejudicial impact of improper argument should not be second-guessed. The Court acknowledged that some trial judges would have proceeded with the trial after giving an appropriate cautionary instruction and

that the mistrial was not strictly "necessary." It nevertheless held that the trial judge's evaluation of the likelihood of jury bias resulting from the improper comment should be accorded "the highest degree of respect." *Id.* at 511. The Court reiterated the concern expressed in *Gori* that application of a stringent standard of appellate review could deter trial courts from mistrial declarations from fear that, if a reviewing court disagreed with the trial court's assessment, double jeopardy would automatically bar a retrial. *Id.* at 513. The trial judge, the Supreme Court noted, "is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more 'conversant with the factors relevant to the determination' than any reviewing court can possibly be." *Id.* at 514 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

This is not to suggest that there will effectively be no appellate review of sua sponte mistrial declarations. The double jeopardy protection embraces the defendant's right to have his trial completed by a particular tribunal. *Id.* This right to continue the original trial through to a verdict must be respected. *Crist v. Bretz*, 437 U.S. 28, 35-36 (1978); *Washington*, 434 U.S. at 514. Therefore, an appellate court must assure itself that the trial judge exercised sound discretion in declaring a mistrial and, if a trial judge acts "irrationally or irresponsibly," the action cannot be condoned. *Id.*

In the present case, the trial court expressed its reasons for declaring a mistrial on the record at the time the mistrial was declared and subsequently elaborated upon those reasons in a written order. The court said that defense counsel's comments and behavior during the trial gave the court concern that counsel was emotionally, and perhaps physically, unfit to continue the trial and that deficiencies in defense counsel's performance, both during and before the trial, showed that Manley was not receiving effective assistance of counsel and was being deprived of a fair trial. Among the concerns articulated by the trial court were the following: defense counsel had not adequately pursued pretrial discovery to require disclosure of the State's evidence; had not disclosed to the State, in response to discovery, items of evidence that he later attempted to introduce at trial, with the consequence that the evidence was excluded by the court; had not obtained an expert to examine any of the physical evidence and, specifically, did not secure a blood spatter expert; filed no motion to suppress the incriminating statements made by Manley during his first interview by police although, in the court's view, there was at least a colorable

issue of whether Manley had made a valid waiver of his *Miranda* rights; engaged in inept cross-examination of a state witness which merely emphasized, to Manley's prejudice, the extent of Manley's anger toward Chris during the hours prior to Chris's death; did not object to the blood splatter opinion testimony of the State's expert on the ground that the evidence had not been timely disclosed by the State, nor request a continuance to respond to that evidence; elicited testimony from the State's expert that was detrimental to Manley; emotionally broke down at points during his opening statement, with the consequence that members of the jury appeared to be confused or concerned as to why defense counsel was unable to maintain his composure; blurted out in open court an accusation that the judge was biased against him as the result of counsel's support for a candidate who had been running against the judge;[7] and expressed concerns that he might have a heart attack as a result of the trial.[8] The trial court concluded:

> [T]here were no alternative measures [other than a mistrial] to explore because the prejudice that Defendant already had suffered due to his attorney's incompetence prior to the declaration of the mistrial could not be cured by a continuance of the trial or any other measure. The State had rested its case and much of the damage had been done as a result of incompetent performance by counsel for the Defendant. The prejudice could not be cured.

Manley disputes many of these findings; he contends that neither the attorney's emotional state nor his physical state necessitated a mistrial and that the perceived deficiencies in his performance either were sound strategic decisions or were the result of the State's failure to live up to an agreement for informal discovery. Properly framed, however, the question presented is not whether some of the attorney's behavior that troubled the district court was explainable or excusable, but whether the trial court's assessment that the behavior cumulatively necessitated a mistrial was an abuse of discretion.

Applying the deferential standard of review that is applicable in this circumstance, we conclude that the trial court did not abuse its discretion in finding that there was a manifest necessity for a mistrial. The trial court clearly acted out of a belief that it was necessary for the

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[7] The district court noted that this accusation from defense counsel was particularly puzzling because by the time of the trial, the judge had announced that he would not run for re-election and would be retiring.

[8] The trial judge also explained that he had presided over another of this attorney's trials during which the attorney had to be hospitalized overnight for heart monitoring.

protection of the accused. This was a murder trial, and if convicted, seventeen-year-old Manley faced the possibility of life imprisonment. In a case of this magnitude, defense counsel rightfully should be expected to proceed with the utmost care and attention to detail. The trial court carefully delineated the aberrations in defense counsel's behavior and the deficiencies in his performance that led to the conclusion that he was not adequately representing Manley. It was reasonable and rational for the trial court to be alarmed by such factors as defense counsel's failure to secure an expert to testify on the blood splatter evidence when he was representing a client who, according to the State's theory, shot his brother while holding a rifle against the brother's chest, yet was found by police with no blood on his body and little on his clothing other than drops on one pant cuff; counsel's failure to engage in discovery formalities that were necessary to ensure that he had obtained disclosure of all discoverable evidence to be presented by the State; his failure to ensure that defense evidence would not be excluded for untimely disclosure; and his sometimes harmful cross-examinations of prosecution witnesses. As to the emotional atmosphere in the courtroom, we are in no position to assess factors that the trial court was able to observe, including defense counsel's tone and appearance and the reactions of the jury. The transcript does confirm, however, that defense counsel apologized to the jury for emotionalism during his opening statement, accused the judge of bias in open court, and alluded to the possibility that the rigors of trial would bring on a heart attack.

We acknowledge that the trial court failed to conduct a hearing at which both parties could address the advisability of a mistrial before the court terminated the trial. A trial court should not foreclose the defendant's option of proceeding to completion of the current trial and a verdict from the current jury until a "scrupulous exercise of judicial discretion" leads to the conclusion that justice would not be served by any alternative. *Jorn*, 400 U.S. at 485. *See also Stevens*, 126 Idaho at 826, 892 P.2d at 893. Ordinarily, that scrupulous exercise of judicial discretion requires a hearing at which the parties may present their positions on the advisability of a mistrial or alternatives, such as a continuance or corrective jury instructions. In *Jorn*, the United States Supreme Court concluded that the trial court had abused its discretion by abruptly discharging the jury and declaring a mistrial with no consideration of the possibility of a continuance and without allowing the prosecutor or the defendant to be heard on the issue. *Id.* at 487. The failure to give the defendant a meaningful opportunity to be heard was also among the

reasons cited by the Idaho Supreme Court in *Stevens* for its holding that the trial court abused its discretion in declaring a mistrial. *Stevens*, 126 Idaho at 827, 892 P.2d at 894.

In the present case, however, the district court explained its decision not to invite argument before aborting the trial:

> During the recess, I determined to announce the mistrial without discussing it with counsel or inviting arguments because of the volatile nature of the situation. Defendant's counsel was obviously either unable to maintain professional bearing and composure or was intentionally engaging in tactics designed to incite the court and/or invite error to frustrate the criminal trial process.
>
> I concluded that any further discussion of the matter with [defense counsel] would only make matters worse. In the interest of maintaining civility and decorum I determined that a mistrial was to be declared sua sponte. This was due in part to the speech by [defense counsel].[9] I determined that any discussion of my concerns about [counsel's] performance on behalf of his client would only generate more self-serving excuses attempting to justify what the record already showed--incompetent counsel for the defendant.

The trial court also noted its consideration, and ultimately its rejection, of options other than a mistrial:

> In this case, I concluded that there were no alternative measures to explore because the prejudice that Defendant already had suffered due to his attorney's incompetence prior to the declaration of the mistrial could not be cured by a continuance of the trial or any other measure. The state had rested its case and much of the damage had been done as a result of incompetent performance by counsel for the defendant. The prejudice could not be cured.
>
> In addition, [counsel's] mental and emotional state, where he appeared to me to be having a breakdown, would not allow a rational discussion nor any information which would explain the obvious, unfair prejudice to his client that the record clearly shows.

The trial court also stated that it had earlier specifically "reviewed the law concerning double jeopardy," as the court "became increasingly concerned about the performance of [defense counsel]."

Although other judges might have proceeded differently, as by conducting a hearing after a continuance for "cooling off," we cannot say that the procedure followed by the judge here constituted an abuse of discretion. The judge has given a reasonable explanation for his decision not to hear from the parties before declaring a mistrial and for his conclusion that no alternative

measures would have been adequate to assure the defendant a fair trial. The trial judge did not act irrationally or irresponsibly. According "the highest degree of respect to the trial judge's evaluation," as we must under the standard of review that is applicable, *Washington*, 434 U.S. at 511, we conclude that there was no abuse of discretion in the district court's determination that there had developed a manifest necessity for a mistrial.

III.

CONCLUSION

Manley's assertion that his further prosecution is barred by double jeopardy is ripe for consideration and was not rendered moot by the district court's order dismissing the charge without prejudice. We conclude, however, that the trial court's declaration of a mistrial was not an abuse of discretion under the "manifest necessity" standard, and therefore, Manley's reprosecution is not precluded by double jeopardy principles. Accordingly, the district court's order denying Manley's motion to dismiss on double jeopardy grounds and its subsequent order dismissing the case without prejudice on the prosecution's motion, are affirmed.

Judge PERRY and Judge GUTIERREZ **CONCUR.**

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[9] The court was referring to counsel's explanation of why he had not engaged in formal discovery.